

**The George A. Tomasso Construction Corp. and  
International Brotherhood of Teamsters, Local  
559, AFL-CIO.** Case 34-CA-6117

March 15, 1995

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND BROWNING

On September 23, 1994, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The George A. Tomasso Construction Corp., New Britain, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

“(b) Remove from its files any reference to the unlawful refusals to recall Michael Mele and William Langley, and notify them in writing that this has been done, and that the evidence of this unlawful activity will not be used as a basis for future actions against them.”

2. Substitute the attached notice for that of the administrative law judge.

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>We shall modify the judge's recommended Order and notice to require the Respondent to remove from its files any reference to its unlawful refusal to recall employees Michael Mele and William Langley and to notify them it has done so.

**APPENDIX**

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to hire, reemploy, or otherwise discriminate against any of you for supporting The International Brotherhood of Teamsters, Local 559, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer William Langley and Michael Mele immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful refusals to recall William Langley and Michael Mele and notify them in writing that this has been done, and that the evidence of this unlawful activity will not be used as a basis for future actions against them.

GEORGE A. TOMASSO CONSTRUCTION  
CORP.

*Thomas W. Doer, Esq.*, for the General Counsel.<sup>1</sup>

*Burton Rosenberg, Esq.*, of New Haven, Connecticut, for the Charging Party.

*James A. Kane, Esq. (Leibowitz, Kane & Bennett)*, of Jericho, New York, for the Respondent.

## DECISION

## STATEMENT OF THE CASE

ARLINE PACTH, Administrative Law Judge. Upon a charge filed on April 22, 1993, by Local 559, International Brotherhood of Teamsters, AFL-CIO (Local 559 or the Union), a complaint issued in this case on August 30, 1993, alleging that the Respondent, The George A. Tomasso Construction Corp. (Respondent or Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by refusing to rehire William Langley and Michael Mele because of their protected, concerted activities on behalf of the Union. Respondent filed a timely answer denying that it had committed any unfair labor practices.

This case was tried in Hartford, Connecticut, on February 28 and March 1, 1994, at which time the parties had full opportunity to examine and cross-examine witnesses, introduce documentary evidence, and argue orally.<sup>2</sup> Subsequently, the parties filed posttrial briefs. On the basis of the entire record, including my observation of the witnesses' demeanor, I reach the following

## FINDINGS OF FACT

## I. JURISDICTION

At all material times, Respondent, a Connecticut corporation with an office and place of business in New Britain, Connecticut (the facility), has been engaged as a heavy highway construction contractor in the building and construction industry. During the 12-month period ending July 1, 1993, Respondent, in conducting its business operations, purchased and received at various points within the State of Connecticut, goods valued in excess of \$50,000 directly from points outside the State. Accordingly, the complaint alleges, Respondent admits, and I find, that The George A. Tomasso Construction Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I also find that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

## Production—The Union Campaign

Respondent has been in the road construction business since 1986. Like other employers in this industry, Respondent experienced annual winter slowdowns, generally lasting from December to March. With little work to be done during this period, Respondent laid off its drivers, and rehired them in March if their performance had proved satisfactory.

The General Counsel contends that Respondent failed to recall two of its drivers, William Langley and Michael Mele (Langley and Mele), in March 1993 because they took active roles in a union organizing campaign. Respondent claims that its equipment manager, Eugene Bartomioli (Bartomioli) who

was responsible for hiring and recalling drivers, followed standing operating procedures in deciding against recalling the two drivers based on reports received from field personnel that their work performance was unsatisfactory.

## Michael Mele

Respondent first employed Mele as a truckdriver in March 1991. He worked without incident until he was laid off with the other drivers in December of that year during the Company's seasonal shutdown. The layoff lasted only 3 weeks, and even during that period, Respondent recalled Mele sporadically for brief assignments lasting a day or two.

Bartomioli rehired Mele in January 1992, on a full-time basis, and assigned him to a 1952 water truck, an ancient behemoth as trucks go, because he was one of the few drivers skilled enough to handle a vehicle which had a complex 20-gear transmission.<sup>3</sup>

Mele testified that in June, he contacted a business agent for Teamster Local 559, a Union to which he previously had belonged, to discuss rejoining. At the same time, he obtained and distributed approximately 12 authorization cards to fellow drivers. Telling them that if they were interested in joining the Union, they should complete the card and return it to Local 559. On August 13, the Union filed a petition for an election. Although an election was scheduled for September 23, it was blocked after the Union filed the instant unfair labor practice charge. The Union withdrew the petition on November 3, and to date, no election has been held.

Mele testified that several of Respondent's senior officials questioned him about his union involvement throughout the summer. The first incident, which occurred in late June or early July, soon after he had distributed the union authorization cards, involved Carl Lorenzetti (Butch), a supervisory master mechanic, who asked Mele "what was going on with this Union business?" (Tr. 42.) When Mele feigned ignorance, Lorenzetti asked him to find out who was responsible for the union campaign and whether anyone had signed cards. (Tr. 42.) Agreeing to look into the matter, Mele responded to another inquiry from Lorenzetti later that same day, by claiming he knew nothing.

A few days later, Lorenzetti again asked him what he knew about the union drive, and again, Mele replied that he knew nothing. At this, Lorenzetti said that six drivers told him that Mele had given them union cards. Mele challenged him to bring the six forward, at which point Lorenzetti dropped the matter.

Mele stated that a few days after this episode, while he was washing his truck, Lorenzetti drove by and shook his fist at him. When Mele asked for an explanation, Lorenzetti reportedly said: "I thought you didn't know anything about those damn Union cards." Mele again proclaimed a lack of knowledge, which elicited a warning from Lorenzetti that "if I find out you got anything to do with damn (sic) Union, I'm going to desecrate you." (Tr. 44.)

Mele testified that Lorenzetti made still another reference to union cards in the latter part of the summer. Irritated by Lorenzetti's persistence, Mele told him that if he did not "get off his back," he would send 10 cards to the Union.

<sup>1</sup> Counsel for the General Counsel will hereinafter be referred to as General Counsel.

<sup>2</sup> The General Counsel's and Respondent's exhibits will be cited as G.C. Exh. and R. Exh., respectively, followed by the exhibit number; the transcript will be designated as Tr. followed by a page number.

<sup>3</sup> Unless otherwise indicated, all events discussed herein took place in 1992.

Lorenzetti urged him not to take such a step; that if he just voted against the Union, he would take care of him.

Lorenzetti denied that he ever discussed the Union with Mele and even claimed that he was unaware that Mele was involved in the union campaign. However, he acknowledged that another employee informed him that Mele had tried to give him a union card during working hours. He then contradicted himself by conceding that he questioned Mele about this accusation, and that Mele had denied it.

Mele stated that Equipment Manager Bartomioli also questioned him, asking how he was going to vote in the union election. When Mele assured him that he would vote against the Union, a skeptical Bartomioli said he wished he could believe him. Bartomioli denied that such a conversation took place.

On December 14, Mele was laid off as part of Respondent's seasonal shutdown, but was assured by Respondent's dispatcher, Robert Quarello, that he would be rehired within 3 weeks. Repeating his experience of the previous year, Mele was given some temporary assignments during the winter layoff, the only driver to receive such employment.

However, several months went by and Mele was not recalled for a permanent position. During this period, he telephoned Quarello a number of times to see if work was available, and invariably was told to wait just a few more weeks. Finally, in early April, Quarello advised Mele he would not be rehired. When Mele asked for an explanation, Quarello replied that "he must have pissed somebody off." (Tr. 51.)

When Quarello testified, he initially denied having said anything like the statement Mele attributed to him. However, after reviewing his affidavit, he shifted from unqualified denial to partial admission, conceding he may have said something of the sort, but using somewhat different language. Quarello painted himself into another corner when he testified that he heard Lorenzetti complaining that Mele was speeding, for he swore in his affidavit that he had heard no complaints about Mele and had complimented him as a good worker.

Equipment Manager Bartomioli testified that although the Company did not have a written disciplinary policy, it was his practice to retain unsatisfactory employees until the customary winter layoff, and then, not recall them when work picked up again.<sup>4</sup> He claimed that he followed this practice in deciding against rehiring Mele, Langley, and three other drivers. Apart from these five employees, Respondent reinstated 34 of the 39 drivers on the company payroll at the time of the December layoff.

Bartomioli explained that he decided not to recall Mele after hearing reports from "field personnel" that the job was too much for him; that he could not follow directions, and was forgetful. Asked to identify the source of these negative reports, Bartomioli named only Lorenzetti.

When Lorenzetti testified about his dissatisfactions with Mele, he said nothing about the driver's purported inability to handle the job or carry out his assignments. Instead, his only comment was that he had observed Mele driving too quickly on a few occasions.

Lorenzetti's testimony about Mele's alleged speeding incidents left much to be desired. For example, he stated that

when he first observed Mele speeding, there was no traffic. However, after a few more questions were posed, he completely reversed himself and asserted that Mele was speeding while in traffic. In a similar about-face, Lorenzetti first said he reported only the first speeding incident to Bartomioli, and could not recall whether it happened in 1991 or 1992. Subsequently, Lorenzetti's memory was miraculously revived and he remembered that he did inform Bartomioli of Mele's propensity for speeding on three occasions. Equally incredible was Lorenzetti's assertion that Mele was the only driver he ever observed speeding. Lorenzetti also maintained at trial that he had no knowledge of Mele's union proclivities; yet conceded that another employee had reported that Mele tried to hand him a union card. Lorenzetti admitted questioning Mele about this report, and then, implied that he accepted at face value Mele's denial of having engaged in such activity. Lorenzetti's zeal to say whatever might serve his employer's interests was obvious and completely discredits him as a reliable witness.

#### William Langley

Langley began working for Respondent on March 23, and, like Mele, was not recalled after the December layoff. Prior to his employment with Tomasso, Langley knew Bartomioli on a casual basis and had asked him for a job on previous occasions. Bartomioli testified that he was reluctant to employ Langley because he was reported to have an "attitude problem." When he finally offered Langley a job as a driver, he warned him to behave himself.

Langley testified that Bartomioli spoke to him about the Union on several occasions. The first exchange occurred in August when Bartomioli asked Langley if he had signed a union card. Langley candidly acknowledged that he had signed a card because he wanted retirement and pension benefits. The conversation ended after Bartomioli told Langley he should have spoken to him before signing the card. Langley indicated that his relationship with Bartomioli grew decidedly chilly after this exchange.

Langley said a second encounter occurred in late September. Fearful that Bartomioli knew he recently had given an affidavit to a NLRB agent, Langley asked him if he still had a job. Giving him short shrift, Bartomioli told him to check the matter out with the Union.

During the same time period, the union business agent sent a letter to Respondent identifying Langley and another driver as a member of the in-house organizing committee. Bartomioli testified that until he received this letter, he did not know that Langley supported the Union. This assertion is somewhat suspect, in light of his comment on receiving the Union's letter, "That was definite then that I knew for sure he was there." (Tr. 146.)

In February 1993, Langley contacted Bartomioli about returning to work, but was told that rehiring would not start in earnest for a number of weeks. Langley called again in April, and this time, Bartomioli told him he had some problems with him and he would not be rehired.

The next day, when Langley telephoned to discuss the matter further, Bartomioli told him that some foremen had problems with him. Langley protested that he should have been told this sooner at which point, he said that Bartomioli blurted out, "you porked me once . . . and you're not going to do it again." Langley asked him if he was referring to

<sup>4</sup>Bartomioli stated that he used the words "rehire" and "recall" interchangeably.

“the Union thing” which led Bartomioli to say, “you figure it out.” (Tr. 90.)

Bartomioli stated that he decided against recalling Langley because various supervisors reported that they had negative experiences with him. Thus, a few weeks after hiring Langley, Tim Traub, Respondent’s superintendent on a major bridge construction project, phoned him to complain about Langley’s attitude toward work, and requested his transfer to another jobsite. However, Bartomioli allowed Langley to remain on the project after reminding him that he had been hired on his promise that he would not pose problems for anyone.

Traub, corroborating Bartomioli’s testimony, testified that he had almost daily contact with Langley and observed him reacting negatively whenever given an assignment. In using the word negative, Traub explained that Langley invariably objected to an assignment; complaining that it didn’t make sense or that there was a better way to do the task. After a period of time, Traub brought the matter to Bartomioli’s attention and asked that Langley be reassigned to a different jobsite. However, Bartomioli assured him that he would talk to Langley. Traub stated that for a couple of weeks, Langley appeared to have “quieted down.” However, it did not take long for his negative attitude to reappear leading Traub to lodge another complaint with Bartomioli sometime during the summer.

Lorenzetti, another supervisor whom Bartomioli identified as having registered a complaint about Langley, related that the driver had telephoned him once to report that his truck had broken down. He stated that on questioning Langley about the cause of the breakdown, the driver responded in a sarcastic and uncooperative manner.

Quarello, whom Bartomioli also cited as having complained about Langley, denied having done so. However, he said that Traub had told him of his problems with Langley.<sup>5</sup> Quarello regarded Langley as a relatively good driver and had not personally observed an attitude problem.

Bartomioli named several others who had voiced complaints about Langley prior to the date he received the Union’s letter, including Vince Seaford, general superintendent on the project to which Langley was assigned and Respondent’s safety director, Chuck Downey. Neither Seaford nor Downey testified. Instead, Bartomioli, said that Downey, reported to him that Langley repeatedly violated several regulations of the State’s Department of Transportation. Bartomioli conceded that Downey complained about all the drivers’ safety performance, but regarded Langley as the most persistent offender.

#### Discussion and Concluding Findings

In order to establish a violation of Section 8(a)(3) of the Act, the General Counsel must show in his case-in-chief that antiunion animus motivated an employer to take adverse action against an employee because he was engaged in union activity. The General Counsel has adduced sufficient evidence to meet this burden.

The record contains ample proof that Respondent’s agents were hostile to the Union and were aware that both Mele and Langley were union activists. Langley readily admitted that

he supported the Union and did not hesitate to have his name appear in the Union’s letter to the Respondent listing him as a member of the organizing committee. Mele, who played a more active role than Langley in the union campaign, tried to conceal his activity, but his efforts were unsuccessful. Because Mele feigned disinterest in the Union, does not mean that Respondent believed him. Lorenzetti and Bartomioli’s persistence in questioning him about the identity of union adherents, threatening him if he engaged in union activity and promising to reward him if he did not, reveal that they were not duped by his efforts to throw them off the track.<sup>6</sup> The various statements which Respondent’s supervisors made to Mele reflect both their hostility toward the Union and their belief that he was a union adherent.

Since the General Counsel adduced evidence to meet each of the elements required to establish a prima facie case, Respondent is required to show that it would not have rehired Mele and Langley even in the absence of their union activity. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Respondent contends that Bartomioli decided against rehiring Mele in March 1993 in reliance on reports that his job performance was unsatisfactory. This defense is wholly unconvincing. None of Respondent’s spokesmen offered evidence of a single incident which supported Bartomioli’s rationale for failing to recall Mele. Indeed, only one supervisor—Lorenzetti—testified about Mele’s performance, and his comments focused solely on several occasions when he purportedly observed Mele speeding. Lorenzetti’s testimony about these incidents did little to inspire confidence; he appeared to be inventing his testimony as questions were put to him. He could not recall whether Mele was driving in traffic until prodded by counsel; he could not remember at first whether he reported to Bartomioli on each occasion that he allegedly observed Mele speeding. He reluctantly acknowledged that he did not observe Mele exceeding the speed limit, yet made the preposterous claim that Mele was the only employee he ever witnessed speeding. Such an assertion defies common sense and everyday experience.

Apart from the multiple defects outlined above which totally undermine Lorenzetti’s credibility, a more basic flaw inheres in Respondent’s reliance on his testimony. While naming only Lorenzetti as the source of reports which led him to reject Mele for reemployment, Bartomioli never suggested that these alleged reports concerned Mele’s purported propensity for speeding. Thus, Respondent failed to produce a single witness to support Bartomioli’s rationale for refusing to recall Mele.

Further, Bartomioli’s assertion that Mele could not handle his job was totally at odds with Mele’s undisputed testimony that a number of Respondent’s supervisors praised his work. Indeed, even Bartomioli conceded that he was a good worker. Only one person—Lorenzetti—suggested that Mele was just an average driver. If Mele’s performance was as defi-

<sup>5</sup> Traub confirmed that he had mentioned his problem with Langley to Quarello who advised him to speak to Bartomolio about it.

<sup>6</sup> I have no difficulty in relying on Mele’s word that Bartomolio and Lorenzetti made the statements which he attributed to them. The supervisors’ denials were stated in general terms and were quite half-hearted. Lorenzetti’s credibility was severely damaged when it became apparent that he was willing to modify his answers if it would better serve his employer’s purposes. More importantly, Mele was a convincing witness; his testimony was consistent, straightforward, and in important respects, uncontradicted.

cient as Bartomioli claimed, then why did he rehire him after the December 1991 layoff? Why was he assigned to drive the same unwieldy truck he previously operated which had a transmission so complex that other drivers could not handle it well? How could Respondent assert that Mele's performance was deficient and at the same time explain why he was the only driver to be recalled for brief assignments during the early winter months of 1993?

Respondent presented no evidence which would resolve these questions in its favor no such evidence existed. Bartomioli's rationale for his treatment of Mele was totally fabricated. The only logical explanation for Bartomioli's failure to rehire Mele is that he held him responsible for initiating and promoting the union campaign. Whether Respondent's conduct is labeled pretextual, or analyzed in accordance with the burden shifting formula propounded in *Wright Line*, the outcome is the same: Respondent discriminated against Mele to penalize him for his support of the Union in violation of Section 8(a)(3) and (1) of the Act.

Langley's situation is more problematic, for there is substantial evidence that Bartomioli received bona fide complaints about him, at least from Traub, before learning of his union propensities. Traub did not strike me as a man who would fabricate such testimony. Moreover Quarello confirmed that Traub first brought his complaints about Langley to him. Further, Traub had ample opportunity over the course of the summer to observe Langley. Thus, his view that Langley was argumentative and uncooperative was not formed on the basis of a few brief incidents.

While the foregoing considerations support Respondent's claim that Langley was not recalled because of complaints to Bartomioli about his negative attitude, other circumstances tend to indicate that these reports did not weigh heavily against him. Thus, it is significant that Traub's complaints about Langley were made during the summer, before Bartomioli received the Union's letter disclosing his status on the organizing committee. Moreover, Bartomioli apparently did not consider Langley's behavior serious enough to warrant removing him from the jobsite as Traub had asked, although transfer to a different location certainly was an available option which had been used on other occasions. Further, although Bartomioli alluded to several other persons who complained about Langley, Respondent called none of those named with the exception of Lorenzetti who related only one encounter with Langley, and that was shortly after he was hired. Lastly, Bartomioli did not specifically deny having told Langley he would not let him "pork" him again.<sup>7</sup>

While the General Counsel has presented evidence tending to establish that Langley's support for the Union was the motivating factor in Bartomioli's decision against recalling him, Respondent also has adduced evidence supporting Bartomioli's claim that he decided against recalling Langley because of negative reports about his attitude. In resolving a classic mixed motive case such as this, it is instructive to bear in mind that the burden-shifting test endorsed in *Wright Line*, supra, at 1087, requires that the respondent prove "by a preponderance of the evidence that it would have reached the same decision" even in the absence of the protected con-

duct." (Emphasis supplied.) Id. (quoting *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977)).

Respondent contends that in order to determine whether it has met this burden, the following additional considerations must be taken into account. First, Respondent submits that since a Board election had been scheduled, Bartomioli had to assume that at least 30 percent of the 39 drivers on its payroll in December 1992 signed authorization cards; yet, he rehired 34 or 87 percent of them.<sup>8</sup> Second, Bartomioli had concrete information regarding the pronoun stance of the two drivers who were identified as members of the organizing committee. Nevertheless, he recalled one of them.<sup>9</sup> Third, the Board refused to issue a complaint in the case of Lisa Reed whose belated recall also was the subject of a union charge. Respondent submits that Bartomioli followed the same practice in deciding not to recall her as he applied in rejecting Langley and Mele. Accordingly, Respondent argues that since the Company did nothing unlawful in Reed's case, it follows that it did nothing unlawful in failing to rehire Langley and Mele either.

The foregoing arguments are not persuasive. With respect to the first two of Respondent's contentions, it is well settled that an employer's failure to eliminate all union adherents does not prove that its actions toward a few were untainted by antiunion bias. See *Master Security Services*, 270 NLRB 543, 582 (1984). Accordingly, the fact that Respondent rehired 34 drivers, some of whom necessarily signed union authorization cards, or failed to terminate several drivers whose union sympathies were known, does not necessarily undermine the Government's case that he unlawfully failed to recall Langley and Mele.

Respondent's bootstrap argument that the outcome in Reed's case should be dispositive of the cases involving Mele and Langley is equally unconvincing. The issue posed here is not whether Respondent's employment policies and practices were intrinsically flawed, but whether they were applied in a neutral, nondiscriminatory manner to the individuals who were allegedly discriminated against in this case. When viewed from this perspective, it is evident that each allegation must be evaluated on its merits. In other words, just as Bartomioli made discrete decisions as to each individual he reemployed, so too does a Regional Director, the trier of fact and the Board evaluate decisions on a case-by-case basis. In sum, the three contentions discussed above do not bolster Respondent's defense.

As emphasized above, *Wright Line's* burden shifting standard requires that the Respondent prove "by a preponderance of the evidence" that it would not have rehired Langley even in the absence of his union activity. Id. On applying this standard here, I conclude that the evidence adduced by the Respondent and the General Counsel is in equipoise. Consequently, the Respondent has failed to prove by a preponderance of the evidence that it would have reached the same

<sup>7</sup>The only person to define this term was Langley who interpreted it to refer to his union activity.

<sup>8</sup>The Board requires a showing of interest by at least 30 percent of the employees in an appropriate unit before an election will be authorized. See the Board's Rules and Regulations, Sec. 101.18.

<sup>9</sup>Employee Mark Wilson voluntarily told Bartomioli that he had signed an authorization card; Joseph Tamburrino's name was listed as a member of the organizing committee in the Union's letter to Bartomioli. Both men were laid off in December and recalled in the spring.

decision and rejected Langley for reemployment even if he had not engaged in union activity. Accordingly, I conclude that Respondent discriminated against Mele and Langley in violation of Section 8(a)(1) and (3) of the Act by failing to rehire them in March 1993.

#### CONCLUSIONS OF LAW

1. Respondent, The George A. Tomasso Construction Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the International Brotherhood of Teamsters, Local 559, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent violated Section 8(a)(3) and (1) of the Act by failing to recall William Langley and Michael Mele as drivers in March 1993.

3. The unfair labor practices cited above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act, including posting the notice appended to this decision.

Specifically, the Respondent shall be directed to offer employees William Langley and Michael Mele reemployment to their former positions as drivers, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed. Further, the Respondent shall make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date they should have been recalled to the date of a proper offer of reemployment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>10</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

#### ORDER

The Respondent, The George A. Tomasso Construction Corp., New Britain, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to recall or rehire employees, or otherwise discriminating against any employee for supporting the International Brotherhood of Teamsters, Local 559, AFL-CIO or any other union.

<sup>10</sup>In calculating lost earnings, the compliance officer shall take into account any periods of time that Lanley and Mele would have been laid off for nondiscriminatory reasons, in accordance with the seasonal nature of employment with the Respondent.

<sup>11</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer William Langley and Michael Mele immediate and full reemployment to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in New Britain, Connecticut, copies of the attached notice marked "Appendix.<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>12</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to hire, reemploy, or otherwise discriminate against any of you for supporting the International Brotherhood of Teamsters, Local 559, AFL-CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer William Langley and Michael Mele immediate and full reemployment to their former jobs or, if those jobs no longer exist, to substantially equivalent positions,

without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

THE GEORGE A. TOMASSO CONSTRUCTION CORP.